WIRA SAWIT SDN BHD A

v.

HJ ALANG MOHD SAMIN TAK SALLEH

HIGH COURT MALAYA, TAIPING B
AHMAD NASFY YASIN JC
[ORIGINATING SUMMONS NO: 24NCVC-62-5-2012]
9 OCTOBER 2012

CIVIL PROCEDURE: *Originating summons - Declaration - Application for - Application for settlement between parties to be declared valid and binding and for suit to be struck out - Res judicata - Principles - Whether applied - Whether purported settlement valid - Whether reliefs sought misconceived and unsustainable* C

CIVIL PROCEDURE: *Res judicata - Principles - Whether issues raised and argued in previous court same as present court - Whether principle of res judicata and/or issue of estoppel applied* D

CONTRACT: *Joint venture agreement - Termination - Agreement to develop lands into oil palm estate - Agreement terminated when no profits gained after ten years - Parties allegedly agreed to settle suit and counterclaim amicably with no order as to costs - Agreement affirmed by High Court but reversed by Court of Appeal - Whether High Court had jurisdiction to make such orders - Principle of res judicata and/or issue of estoppel - Whether purported settlement valid* E F

The plaintiff had entered into a joint venture agreement ('JVA') with landowners, including the defendant, for the development and management of lands for profit. Seeing that no profits were gained although ten years had passed, the defendant together with 103 G others terminated their respective JVAs. The landowners then appointed Plantation Agencies Sdn Bhd ('PASB') to manage the oil palm plantations in their lands. The plaintiff proceeded to file a suit ('the suit') for, *inter alia*, (i) a declaration that the termination of the JVA by the defendant was unlawful; (ii) specific H performance of the JVA; and (iii) orders injuncting the defendant and PASB from entering, managing, collecting proceeds or taking any machines or fruits from the land. The defendant then counterclaimed for, *inter alia*, (i) a declaration that the termination was valid; (ii) an injunction restraining the plaintiff from, *inter alia*, I entering the land; and (iii) for damages for breach of contract, including payment of accrued profits under the JVA. Upon

A appearance before the court, the plaintiff filed an application for leave to discontinue its claim against the defendant and PASB and to discontinue the defendant's counterclaim under O. 21 r. 3 of the Rules of the High Court 1980 ('RHC'). The application was based on a purported settlement between the B plaintiff and the defendant. The whole basis of the plaintiff's application to discontinue the defendant's counterclaim was a sale and purchase agreement ('SPA') entered into between the plaintiff and the defendant. By virtue of this agreement, the plaintiff allegedly agreed to buy and the defendant agreed to sell his land C to the plaintiff for a sum of RM20,000. The parties also purportedly agreed to settle the suit amicably with no order as to costs, and were supposed to inform the court of the same in writing. The High Court agreed with the plaintiff and granted all orders sought in the application. Aggrieved, the defendant and D PASB appealed to the Court of Appeal and the appeal was allowed, setting aside orders of the High Court on the basis that the High Court did not have the jurisdiction to make the said orders. Hence, the present appeal. The plaintiff filed encl. 2 by way of originating summons ('OS') for (i) the settlement reached E between the plaintiff and the defendant to mutually withdraw the main claim and counterclaim in the suit without any order as to costs be declared valid and binding upon the parties; and (ii) in so far as it concerned the plaintiff and the defendant, that the suit be struck out and dismissed without any order as to costs. The F issues that arose herein were (i) whether the principle of *res judicata* and/or issue of estoppel applied; (ii) whether the purported settlement was valid; and (iii) whether PASB was a party to the purported settlement.

G **Held (dismissing OS in encl. 2 with costs):**

(1) The issues raised and argued in the Court of Appeal were the same as that were before the present court. Therefore, the plea of *res judicata* as well as the issue of estoppel raised by the defendant applied in the present case. This court could H not revisit the issue which had already been deliberated by the Court of Appeal. In other words, the plaintiff could not now seek to relitigate by filing a fresh suit in respect of a matter that had been fully and finally decided. There must be finality to the litigation on this point and the plaintiff must be I prevented from seeking to get a second bite of the proverbial cherry. (paras 32 & 33)

(2) The plaintiff only sought orders regarding the validity of the purported settlement to mutually withdraw the main claim and counterclaim in the suit. The plaintiff was not interested at all in the question of whether or not the SPA was a valid and binding document, although it was fully-aware that the defendant had previously contested the validity/enforceability of the SPA. The RHC does not allow withdrawal by consent without leave of the court. It would be a blatant violation of the requirement of the RHC if the purported agreement to withdraw the claims by way of a letter to court be declared valid and binding. More so since cl. 14 of the SPA, which stated that the agreement to withdraw served as consideration to both parties, might be construed as bad in law. (paras 35, 36 & 37)

(3) PASB, the second defendant in the suit, was not a party to the alleged compromise and as such was not bound by it. Nevertheless, the relief sought by the plaintiff in the OS ignored the fact that PASB was a party to the suit and was entitled to a final determination of all the issues in the suit and had, at no time, agreed otherwise. The court would still have to proceed to determine the issues in the suit in relation to PASB, which would in turn involve a consideration of the rights and interests of the defendant who was one of 104 land owners who authorised the works of the PASB. Thus, the relief sought by the plaintiff in encl. 2 was misconceived and unsustainable. The defendant was *dominis litis* and was clearly entitled to have his counterclaim properly decided. The defendant was thus entitled to have the judgment he had been waiting for, to be decided on merits in the suit. (paras 38 & 39)

Case(s) referred to:

Bank Kerjasama Rakyat Malaysia Bhd v. Tetuan Haranay, Roni & Anikah & Ors [1999] 1 CLJ 569 HC ***(refd)***

Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14 SC ***(refd)***

Bank Utama (Malaysia) Berhad v. Seri Mayhua Sdn Bhd & 3 Ors [2000] 1 LNS 82 HC ***(refd)***

Government of Malaysia v. Dato Chong Kok Lim [1973] 1 LNS 35 HC ***(refd)***

Greenhalgh v. Mallard [1947] 2 All ER 255 ***(refd)***

Kenanga Innovasi Sdn Bhd v. Toh Kin Lam & 7 Ors [2006] 1 LNS 192 HC ***(refd)***

Lim Oh & Ors v. Allen & Gledhill [1998] 4 CLJ 667 CA ***(refd)***

A *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors [2010] 2 CLJ 501 HC* ***(refd)***
MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [1998] 1 LNS 260 HC ***(refd)***
NKR Arunasalam Chettiar Karuppan Chettiar v. Goh Yew Jing & Ors [1999] 1 LNS 250 HC ***(refd)***
B *Quality Concrete Holdings Bhd v. Classic Gypsum Manufacturing Sdn Bhd & Ors [2012] 5 CLJ 33 CA* ***(refd)***
Sim Thong Realty Sdn Bhd v. Teh Kim Dar [2003] 3 CLJ 227 CA ***(refd)***
Sykt Perkhidmatan Bas Sibuga Sdn Bhd v. Sykt Bas Jalan Leila Sdn Bhd [1997] 3 CLJ 614 HC ***(refd)***
C *Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals [1999] 4 CLJ 651 HC* ***(refd)***
Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor [1993] 4 CLJ 476 HC ***(refd)***
Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & 2 Ors [1993] 3 CLJ 667 HC ***(refd)***
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Legislation referred to:
Evidence Act 1950, ss. 91, 92(a)
Rules of the High Court 1980, O. 21 rr. 2(4), 3(1), O. 41 r. 1(4)

E *For the plaintiff - Lee Chan Leong; M/s Chan Leong & Co*
For the defendant - Jessica Ram Dinwani (Kumaari with her); M/s Kanesh Sundrum & Co

Reported by Najib Tamby

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JUDGMENT

Ahmad Nasfy Yasin JC:

G **Appeal**

[1] This is an appeal by the plaintiff against my decision made on 27 August 2012 wherein I had dismissed encl. 2 with costs.

Enclosure 2

H **[2]** Enclosure 2 is an application by the plaintiff filed by way of originating summon for the following:

(i) That the settlement reached between the plaintiff and defendant to mutually withdraw the main claim and counterclaim in the suit without any order as to costs be declared valid and binding upon the parties;

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(ii) Consequent thereto, in so far as it concerns the plaintiff and the defendant, the main claim and counterclaim in the suit be struck out and dismissed without any order as to costs.

Factual Background

[3] On 1 September 1989 the plaintiff and the defendant entered into a Joint Venture Agreement ("JV Agreement") for the development and management of the defendant's land in Rancangan Tanah Hong, Mukim Pulau Kemiri, Perak for profit. Similar agreements were entered into by the plaintiff with owners of over 100 other plots of lands located within the vicinity, into an oil palm plantation.

[4] By way of a letter dated 24 June 1999, the defendant together with 103 other landowners, terminated their various JV Agreements with the plaintiff on the grounds of fundamental breaches of the JV Agreements by the plaintiff. In the main the landowners' grievance was that, although ten years had passed then from the execution of the JV Agreements with the plaintiff, the landowners, including the defendant had yet to see any profits from the venture.

[5] Upon termination of the JV Agreements, the landowners appointed professionals known as Plantation Agencies Sdn Bhd ('PASB') to manage the oil palm plantations in their lands. On the instructions of the landowners, PASB entered into possession of the lands on 1 July 1999 and began to manage the same on behalf of the defendant and the 103 other landowners.

[6] The plaintiff then filed a suit ("the suit") to obtain specific performance of the JV Agreement and obtained an interim injunction on 19 August 1999 to *inter alia*, remove PASB from managing the lands.

[7] By the action, the plaintiff prayed the following:

(a) A declaration that the termination of the JV Agreement by the defendant was unlawful;

(b) Specific performance of the JV Agreement;

(c) Among others, orders that:

(i) That defendant and PASB be injuncted from entering Rancangan Tanah Hong for the duration of his JV Agreement with the plaintiff;

A (ii) The defendant and PASB be injuncted from taking any machines or oil palm fruits, etc, from Rancangan Tanah Hong;

(iii) The defendant and PASB be injuncted from interfering B with the management of Rancangan Tanah Hong by the plaintiff;

(iv) The defendant and PASB to return to the plaintiff all proceeds collected from Rancangan Tanah Hong upon service of the relevant court order.

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(d) Damages *in lieu* of specific performance.

[8] The defendants filed a counterclaim, wherein he prayed for:

D (a) A declaration that the defendant's termination of the JV Agreement is valid in law;

(b) An injunction against the plaintiff, *inter alia*, from entering into or interfering with the defendant's control of his land;

E (c) Damages for breach of contract, including payment of accrued profits under the JV Agreement;

(d) Exemplary damages.

[9] The trial of the suit commenced on 5 December 2000 and F ended on 7 September 2005. The court was to have decided on 9 November 2006, but this was adjourned without a date. The defendant filed further submissions on 21 November 2006. The defendant's solicitor wrote several times subsequently, requesting that the court fix the matter for decision on 23 November 2006, G 28 February 2007, 11 April 2007, 28 June 2007, 19 October 2007, 10 November 2007 and 3 January 2008. At all times and until 30 September 2009, the defendant was represented by Messrs. Meena Raman & Partners, Penang.

H **[10]** On 30 June 2008, the Taiping High Court telephoned the defendant's solicitors to inform them that the defendant had sent a letter to the High Court informing the court of his intention to withdraw his counterclaim, and sought to confirm the same.

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[11] Ms Meenakshi Raman immediately responded by a letter and informed the court, after confirming with the defendant, that the defendant had no intention to withdraw his counterclaim. The defendant's solicitors then urged the court to fix a date for the decision of the case on an urgent basis.

[12] On 2 July 2008, the Taiping High Court wrote to Messrs Meena Raman & Partners, again, enclosing both the defendant's letter dated 19 June 2008 and the plaintiff's letter dated 24 June 2008. The court then fixed the matter for clarification.

[13] Subsequent to parties appearing before the court for clarification, the plaintiff filed an application for leave to discontinue its claim against the defendant and PASB as well as to discontinue the defendant's counterclaim under O. 21 r. 3 RHC. The application was based on a purported settlement between the plaintiff and the defendant. The whole basis of the plaintiff's application to discontinue the defendant's counterclaim was a sale and purchase agreement ('SPA') entered into between the plaintiff and defendant. By virtue of this agreement, the plaintiff allegedly agreed to buy and the defendant agreed to sell his land to the plaintiff for a sum of RM20,000 only. The parties also purportedly agreed to settle the suit amicably with no order as the costs, and were supposed to inform the court of the same in writing.

[14] Upon hearing arguments from both parties, the Taiping High Court agreed with the plaintiff and granted all orders sought in the application.

[15] Being aggrieved by that decision the defendant and PASB appealed to the Court of Appeal. The Court of Appeal allowed the defendant and PASB's appeal and set aside all orders made by the Taiping High Court on the basis that the High Court did not have the jurisdiction to make the orders that it did in the suit. The Court of Appeal also held that there was no settlement at all. The plaintiff then sought leave from the Federal Court to appeal, but leave was refused.

Issues for Determination

[16] So much for the background. Now, before me, the plaintiff filed the originating summons in encl. 2 to obtain the following orders that I have alluded to earlier.

[17] The issues are as follows:

(i) Whether the principle of *res judicata* and/or issue estoppels applies;

(ii) The validity of the purported settlement;

(iii) PASB is not a party to the purported settlement.

Preliminary Issue

[18] Before I proceed to examine the issues at the heart of the matter, I must first deal with a preliminary issue raised by the plaintiff. In the course of this proceeding, the plaintiff's solicitor has raised an objection as regard to two affidavits filed by the defendant's solicitor.

[19] The plaintiff objected to the defendant's second affidavit affirmed by Richard Keith Jones on 9 July 2012 and the defendant's third affidavit affirmed by Meenakshi Raman on 7 August 2012 on the basis that none of these affidavits averred to the fact that they were authorised to be filed by the defendant.

[20] The plaintiff's solicitors has submitted that in so far as the issue on the consensus for the mutual withdrawal of the main claim and counterclaim in the suit, the defendant's version differs from that of the plaintiff. It is trite law that the court is always at liberty to examine the conflicting affidavits by assessing the same against the backdrop of the surrounding circumstances and come to a conclusion accordingly (see *Bank Negara Malaysia v. Mohd Ismail Ali Johor & Ors* [1992] 1 CLJ 627; [1992] 1 CLJ (Rep) 14; [1992] 1 MLJ 400, *Kenanga Innovasi Sdn Bhd v. Toh Kin Lam & 7 Ors* [2006] 1 LNS 192; [2006] 4 MLJ 590). Since none of these affidavits had averred to the fact that it was authorised to be filed by the parties to the proceedings, be it the plaintiff or the defendant, then the said two affidavit should be ignored by the court.

[21] In reply to this objection, the defendant's solicitor submitted that none of the deponents are the defendant's representatives but both have affirmed affidavits as independent witnesses, to give this court a complete account of all facts and issues involved in this matter. As such there is no need for any authorisation from

any party to affirm an affidavit and cited the case of *Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals* [1999] 4 CLJ 651, *Bank Utama (Malaysia) Berhad v. Seri Mayhua Sdn Bhd & 3 Ors* [2000] 1 LNS 82 in support of his contention.

[22] The plaintiff's solicitor also submitted that the defendant is not allowed to adduce evidence to contradict, vary, add to or subtract from its terms, based on the provisions of s. 92 of the Evidence Act 1950. In support the cases of *Bank Kerjasama Rakyat Malaysia Bhd v. Tetuan Haranay, Roni & Anikah & Ors* [1999] 1 CLJ 569; [1999] 5 MLJ 199 and *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476 were referred to.

[23] In my judgment this issue falls to be resolved by looking at the relevant provision of O. 41 that deals specifically with affidavit. A close scrutiny of O. 41 clearly shows that there is nothing there to even remotely suggest that there is a pre-condition that a deponent must be authorised to swear an affidavit by a party to the proceeding. The only requirement that made mention of the link between the deponent and party to the proceeding is in r. 1(4) where it is specifically provided that if the deponent is employed by the party to the proceeding, he must state that fact. To my mind, that provision cannot by any stretch of constructed be construed as giving rise to a requirement of stating the authority by the party to the proceeding to swear an affidavit. In this regard I agree with Skinner J (as His Lordship then was) when Lordship made the following observations in the case of *Sykt Ying Mui Sdn Bhd v. Muthusamy Sellapan & Other Appeals* [1999] 4 CLJ 651:

> With respect, I am unable to agree with that decision in so far as it relates to authorisation to swear an affidavit. Order 41 RHC deals specifically with affidavits filed for use in any cause or matter and is conspicuously silent on any requirement that a deponent must be authorised to swear an affidavit. It is pertinent to note that by r. 1(4) of the Order, an employee of a party to a cause or matter may swear an affidavit but the affidavit must state that fact. There is however no requirement that such employee must go on further to state that he is also authorised to swear the affidavit before it can be read in the cause or matter. This shows that authority is not a prerequisite to swearing an affidavit. If that be the case, I can see no justification for the imposition of such a requirement on any deponent of an affidavit. Perhaps the position becomes clearer by looking at how evidence is adduced in court at different stages of a cause or matter. At trial, evidence will normally be introduced through the oral testimony of a witness but there is no requirement that before a person

testifies, he must be authorised to do so by the party who calls him. If authority to testify is not a prerequisite at a trial that position must surely not change just because a matter is at an interlocutory stage when evidence is introduced through affidavit evidence.

I am aware of the decision to the contrary as in the cases of *MR Properties Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [1998] 1 LNS 260; [1999] 1 AMR 810 and *Twenty First Century Oils Sdn Bhd v. Bank of Commerce (M) Bhd & 2 Ors* [1993] 3 CLJ 667. However, in my considered judgment, the reasoning in *Sykt Ying Mui* is in accord with the express provisions of O. 41 and is thus preferable from the decisions to the contrary. I wish to also add that to read the pre-condition of obtaining authorisation of the party to the proceeding, or either of them, before an affidavit could be received by the court does not stand to reason and will prohibit a reception of an affidavit by a third party swearing the same in his personal capacity stating facts that are within his knowledge. More so when the affidavit is sworn to assist the court in coming to a just and proper decision.

In any event and having considered the submission of both parties, I am of the view that the plaintiff's objection to the two affidavits filed from non-party is also not sustainable as the defendant has complied with the proviso (a) to s. 92 of the Evidence Act 1950 (see *Quality Concrete Holdings Bhd v. Classic Gypsum Manufacturing Sdn Bhd & Ors* [2012] 5 CLJ 33). I note that in the cases cited by the plaintiff's counsel no reference was made to the proviso (a) to s. 92 of the Evidence Act. I also note that none of the cases above discussed the issue of raising fact to invalidate the document in question. In the present case, at all times, the defendant's argument has been that the alleged settlement agreement was unfair and unconscionable and must be invalidated. Thus evidence may be adduce under s. 92(a) of the Evidence Act to show the illegality, etc, by the contracting party. (see *Sim Thong Realty Sdn Bhd v. Teh Kim Dar* [2003] 3 CLJ 227).

Submissions Advanced By Both Parties

[24] Having ruled on the preliminary issue, I will now return the crux of the arguments in the case herein. The plaintiff's solicitor argued that the defendant had admitted that he had executed the SPA to sell the land for the consideration as per terms as stipulated therein, but somehow denied that he had agreed to the settlement notwithstanding and in direct contradiction to the

express provisions of cl. (iv) in the preamble at p. 1 and cl. 14 at p. 4 of the SPA as well as his letter of withdrawal issued to the court. According to counsel for the plaintiff, as a matter of law, such contention is clearly unarguable because the terms of the SPA speak for itself and the parties are not allowed in law to contradict, vary, add or subtract from its items: s. 92, Evidence Act 1950. When the clause in an agreement is clear and unambiguous, the effect of ss. 91 and 92 of the Evidence Act 1950 will be fully applied. The case of *Tan Ah Chim & Sons Sdn Bhd v. Ooi Bee Tat & Anor* [1993] 4 CLJ 476; [1993] 3 MLJ 633 was cited as an authority for the argument.

[25] According to the plaintiff, the defendant's contention is equally unsustainable, being contrary to and rebutted by the evidence of Puan Aina (refer to the plaintiff's fourth affidavit in support) an independent advocate and solicitor who attended to and witnessed the execution of the SPA and the letter of withdrawal by the defendant. In short, the plaintiff further argued, the defendant was fully understood the express condition in the SPA regarding the withdrawal of the suit and the effect of endorsing her signature as witness on the letter of withdrawal. More so the evidence of Encik Mehat Ismail (refer to the plaintiff's second affidavit in support) and the evidence of Mr Leong Kok Heng @ Leong Kok Cheng (refer to the plaintiff's first affidavit in support) and the evidence Cik Norhanitulakmar, a clerk working for the purchaser's solicitors firm, beyond doubt have supported the plaintiff's version as true. On the contrary, the defendant's version clearly portrays an afterthought depicting his subsequent change of mind for reasons and purpose best known to himself.

[26] The plaintiff's answer to the defendant's contention that the purchase price provided for under the SPA in respect of land was a below the market price was that, as a matter of law, the fact that a person pays "too much" or "too little" for a thing does not in itself affect the validity of the contract. The plaintiff referred to the case of *NKR Arunasalam Chettiar Karuppan Chettiar v. Goh Yew Jing & Ors* [1999] 1 LNS 250; [1999] 6 MLJ 202.

[27] In meeting the plaintiff's arguments, the defendant's counsel argued that the issue concerning the existence or validity or effect of the purported settlement has been decided by the Court of Appeal on 23 May 2012 and cannot be revisited by this

A Honourable Court whether in the suit or in the action herein. The Court of Appeal, argued the counsel, had allowed the appeal not merely on the basis that the High Court lacked jurisdiction to deal with the settlement but also said:

B > if parties had settled, then there should have been no dispute on the fact of the settlement, when there is dispute on the alleged settlement, the right thing to do would be to rule that there was no settlement and proceed as there was no settlement ... Appeal allowed, all orders below set aside (refer Broad Ground Ex. "LKC-6")

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[28] It was canvassed by the defendant that the plaintiff cannot raise a second time an issue that had already been determined either expressly or by necessary implication. In short the principle of *res judicata* applies - *Sykt Perkhidmatan Bas Sibuga Sdn Bhd v.* D *Sykt Bas Jalan Leila Sdn Bhd* [1997] 3 CLJ 614.

[29] The defendant further argued that the plaintiff is only seeking orders regarding the validity of the purported settlement to mutually withdraw the main claim and counterclaim in the suit and E that the plaintiff seek no remedies whatsoever pertaining to the validity of the sale and purchase agreement (SPA) within which the purported agreement to withdraw is contained. It is the defendant's contention that the SPA was a ploy by the plaintiff to get the defendant to sign documents containing the purported F settlement to withdraw the claims in the suit, without his knowledge.

[30] The plaintiff, according to the defendant is now seeking for an order from this Honourable Court that the purported settlement is valid and binding as stipulated in cl. 14 of the SP4 G (exh. "LKC-2"). At the material time, the suit had been heard in full and was awaiting a decision. The Rules of Court do not allow withdrawal by consent, without leave at such stage as provided under O. 21 r. 2(4) of the Rules of the High Court 1980 ("RHC 1980"). The second defendant in the suit, ie, Plantation Agencies H Sdn Bhd (PASB) was not a party to the alleged compromise. As such it is not bound by it. The defendant reasoned that the plaintiff in this action *vide* the originating summons in encl. 2 ignores the fact that PASB is a party to the suit and is entitled to a final determination of all issues in the suit and has at no time I agreed otherwise. Further, the plaintiff filed another suit at the Taiping High Court, ie, Civil Suit No: 22-39-99 against, among

others, PASB, for damages for allegedly defamatory statements made at the time a director of PASB visited the lands in question. That civil action has been stayed by agreement between the parties therein pending the proper determination of this suit. It was agreed that parties would pursue this suit to its conclusions the decision in this suit will affect the outcome in Civil Action No. 22-39-99. Thus, it is argued by the defendant that permitting the plaintiff to discontinue this suit against the defendant would therefore cause manifest injustice to PASB as almost 13 years have passed since the events in this case took place.

Findings Of Court

[31] Having fully and carefully considered the affidavits and issues raised in the written submission, I now come to a decision as follows:

Issue (i) - Whether The Principle Of Res Judicata And/Or Issue Of Estoppels Applies

[32] As a matter of fact, I find that the issues raised and argued in the Court of Appeal are the same as that are before me in encl. 2.

[33] I am of the view that this court cannot revisit the issue which was already deliberated by the Court of Appeal. In other words the plaintiff cannot now seek to relitigate by filing a fresh suit in respect of a matter that has been fully and finally decided. To my mind, there must be finality to the litigation on this point and the plaintiff, must be prevented from seeking to get a second bite of the proverbial cherry. (see *Greenhalgh v. Mallard* [1947] 2 All ER 255, *Government of Malaysia v. Dato Chong Kok Lim* [1973] 1 LNS 35; [1973] 2 MLJ 74, *Lim Oh & Ors v. Allen & Gledhill* [1998] 4 CLJ 667; [1998] 4 MLJ 645). Hence, the plea of *res judicata* as well as issue estoppel as raised by the defendant is well taken and applies in this case.

Issue (ii) - The Validity of The Purported Settlement

[34] I note as a matter of fact, from the evidence before me, the defendant contended that the alleged agreement cannot be upheld or enforced for the following reasons:

(a) The agreement is inchoate as it is conditional agreement;

(b) The agreement was procured by way of undue influence or unconscionable bargain and must be set aside;

(c) Any agreement signed alone by the defendant which effects the main suit is invalid based on the plaintiff's stand that the defendant cannot act on his own but must act collectively with the rest of the landowner. Although the defendant did not agree with, this argument of collectivity, was clearly taken by the plaintiff. Thus the plaintiff cannot approbate and reprobate.

[35] In this case, the plaintiff only seeks orders regarding the validity of the purported settlement to mutually withdraw the main claim and counterclaim in the suit. The plaintiff is not interested at all in the question of whether or not the SPA is valid and binding document, although fully aware that the defendant had previously contested the validity/enforceability of the SPA.

[36] As I mentioned earlier, the suit had been heard in full and was awaiting a decision. In this regard, to my mind the RHC does not allow withdrawal by consent without leave of the court. Order 21 r. 2(4) RHC 1980 has clearly stated that as follows:

> (4) if all the parties to an action consent, the action may be withdrawn without the leave of the court at any time before trial by producing to the Registrar a written consent to the action being withdrawn signed by all the parties.

And O. 21 r. 3(1) RHC 1980 provides:

> Except as provided by rule 2, a party may not discontinue an action (whether begun by writ or otherwise) or counterclaim, or withdraw any particular claim made by him therein, without the leave of the Court, and the Court hearing an application for the grant of such leave may order the action or counterclaim to be discontinued, or any particular claim made therein to be struck out, as against any or all of the parties against when it is brought or made on such terms as to costs, the bringing of a subsequent action or otherwise as it thinks fit.

[37] With respect, I am of the view that it is a blatant violation of the requirement of the RHC if the purported agreement to withdraw the claims by way of a letter to court be declared valid and binding. More so cl. 14 of the SPA which states that the agreement to withdraw serves as consideration to both parties may be construed as bad in law (see *Malayan Banking Bhd v. Neway Development Sdn Bhd & Ors* [2010] 2 CLJ 501).

Issue (iii) - PASB Is Not A Party To The Purported Settlement

[38] It is not disputed that PASB, the second defendant in the suit was not a party to the alleged compromise and as such is not bound by it. Nevertheless the relief sought by the plaintiff in the OS in my judgment, ignores the fact that PASB is a party to the suit and is entitled to a final determination of all the issues in the suit and has at no time agreed otherwise. In this regard the court will still have to proceed to determine the issues in the suit in relation to PASB, which will in turn involve a consideration of the rights and interests of the defendant who was one of 104 landowners who authorised the works of the PASB. Thus, in my opinion the relief sought by the plaintiff in encl. 2 is misconceived and unsustainable.

[39] In all the circumstances of this case I am of the considered view that the defendant is *dominis litis* and clearly entitled to have his counterclaim properly decided. Thus the defendant is entitled to have the judgment he has been waiting for, decided on merits in the suit.

Conclusion

[40] Based on the foregoing reasons, I have no hesitation is dismissing this originating summons in encl. 2 with costs. I so order.